NO. 89-1117

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

FIRST NATIONAL BANK OF BELLAIRE,
Petitioner,

v.

HUFFMAN INDEPENDENT SCHOOL DISTRICT AND
STATE OF TEXAS - COUNTY OF HARRIS,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR THE
FOURTEENTH DISTRICT OF TEXAS AT HOUSTON

MOTION OF THE STATE OF TEXAS FOR LEAVE TO INTERVENE TO FILE BRIEF IN OPPOSITION and INTERVENOR'S BRIEF IN OPPOSITION

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March 30, 1990

LIST OF PARTIES

PETITIONER:	FIRST NATIONAL BANK OF BELLAIRE
RESPONDENTS:	HUFFMAN INDEPENDENT SCHOOL DISTRICT AND STATE OF TEXAS - COUNTY OF HARRIS
INTERVENOR:	STATE OF TEXAS

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MOTION OF THE STATE OF TEXAS FOR LEAVE TO INTERVENE TO FILE BRIEF IN OPPOSITION

To the Supreme Court of the United States:

On March 2, 1990, the Attorney General of the State of Texas received notice from Petitioner, when Petitioner delivered a copy of its petition for writ of certiorari to the Attorney General of Texas, that the constitutionality of a statute of the State of Texas, the Texas Tax Code, is drawn into question.

Jim Mattox, Attorney General of the State of Texas, respectfully moves that an order be entered permitting the State of Texas to intervene and become a party respondent

for the purposes of filing a brief in oposition to the petition for writ of certiorari. The State of Texas further moves for order granting leave to file the attached Intervenor's Brief in Opposition.

The State of Texas should be permitted to intervene because this is a proceeding wherein the constitutionality of Sections 32.01, 32.05(b), 25.19(a), 41.41, 42.01 and 42.09 of the TEXAS TAX CODE, statutes of the State of Texas which affect the public interest, are drawn into question. The State of Texas cannot find record that it was notified at the state court level of the proceeding as provided by TEX. CIV. PRAC. & REM. CODE ANN. Sec. 37.006 (Vernon 1986). The State of Texas has not been provided with an opportunity to intervene in this proceeding before this time.

Respectfully submitted,

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STATE OF TEXAS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner Misstates The Facts

Petitioner on page 1 of its Brief states:

> . . . Respondent taxing units increased the appraised value of real property . . ..

On page 9 of Petitioner's Brief Petitioner states:

> . . . a portion of the property consisting of 379.74 acres was reappraised by the Respondent taxing authority . . ..

These statements are not true. Respondent taxing authority did not reappraise this, or any other land. The land was appraised by the Harris County Appraisal District, an entity separate from Respondent taxing units. Tex. Tax Code Ann. § 6.01. Petitioner actually applied to the Harris County Appraisal District and secured a reduction in the appraised value after January 1986. Petitioner's Brief, p. 9.

The Facts of the Case

Petitioner was already the owner of the property, not a lienholder, when it filed its cross-motion for summary judgment asserting that as a lienholder its lien should be superior to the tax lien because it had not been accorded due process.

Petitioner obtained a reduction in the appraised value following the 1986 tax assessments and a corresponding reduction in taxes. Petitioner's Brief p. 9. Petitioner undoubtedly accomplished this by following the procedures of protest and hearing before the Harris County Appraisal District. Tex. Prop. Tax Code § 41.41 *et seq.* Nevertheless, having been through the procedures for protest and adjustment of appraised value, Petitioner failed to make the Harris County Appraisal District a party to this suit.

The property had been appraised for an amount of money, and this amount was subsequently raised by reappraisal. There would have been some taxes assessed against the property before the appraised value was increased.

Petitioner's position is that none of the taxes, not just the tax increase occasioned by the increased appraisal, should have a lien superior to the mortgage lien claimed by Petitioner.

SUMMARY OF ARGUMENT

Respondent taxing units had nothing to do with the increase in the appraised value of Petitioner's property; the appraised value was increased by the Harris County Appraisal District, which is not a party to this suit.

The Harris County Appraisal District should have been made a party, since Petitioner's complaint of denial of due process is addressed to the procedures of the appraisal district. If the appraisal district had been made a party it could have explained its procedures to the trial court, and would have been subject to an order directing it to grant Petitioner a hearing on the question of appraised value.

It is not appropriate for the courts to grant any relief involving adjustment of the appraised value, because the appraisal district is not a party. It is not appropriate for the courts to abolish the priority of Respondents' tax liens, because the proper relief if any, would have been to order a reduction in the amount of the tax liens proportional to the excess appraisal value, if it is excessive.

BRIEF OF THE ARGUMENT

Petitioner is a sophisticated creditor that asserts it is the victim of a public school system's appraisal method, when it is a fact well known to Petitioner that under Texas law the school system does not make appraisals of property for tax purposes. Texas has a two tiered tax system whereunder the various taxing units, school districts, counties, college districts, cities, etc., levy taxes each year by adopting a tax rate at a public hearing. Sec. 26.05 Texas Tax Code. Each taxing unit assesses taxes by applying the adopted tax rate to the value shown on the appraisal roll for each property—this action creates a tax roll. Secs. 26.05, 26.06, Texas Tax Code.

No taxing unit, such as a school district, city, college district, county, etc., has any authority to appraise, or determine the value of any property. The value of all property is determined by a central appraisal authority called the appraisal district. Only the appraisal district can increase or lower an appraised value, and the Texas Tax Code provides procedures for the appraisal districts to follow in doing this. In this case the appraisals were made by the Harris County Appraisal District.

There is no procedure by which Respondents Huffman Independent School District and Harris County could have made any appraisal of Petitioner's property, or could have increased or decreased any appraisal of Petitioner's property. The Texas Courts could not order Respondents Huffman Independent School District and Harris County to lower the appraised value on Petitioner's land, because Respondents do not maintain the appraisal rolls and have no access to them. The appraisal records are maintained by the Harris County Appraisal District. Since Petitioner did not make the Harris County Appraisal District a party to this suit, the courts could not and cannot make a decision regarding the constitutionality of the appraisal district's procedure or to order any party to this suit to do anything about the appraised value of Petitioner's land.

If Petitioner had sued the appraisal district, the opinion of the Houston Court of Appeals in *First National Bank v. Huffman Independent School District,* 770 S.W.2d 571 (Tex. App.—Houston [14th Dist.] 1989, writ denied), that it was not deprived of due process by the appraisal district might have been germane to some issue in this case. Since the Harris County Appraisal District is not a party to this suit, whether the appraisal district's procedures satisfied Petitioner's right to due process is not an issue that can now be resolved.

Petitioner obscures the question and by referring to "taxing agencies," "taxing authorities" and "Respondent

taxing authorities" as if at all times Petitioner is referring to Respondents, the parties to this suit. As a matter of fact no party to this suit increased the appraised value of Petitioner's property. It is true that, as stated at the top of page 7 of Petitioner's brief, that the Respondent school district and Harris County might reassess the taxes each year; but it is not true that the school district and the county must give notice to the landowner when land is reappraised at a higher value. This is the duty of the appraisal district, which is not a party to this suit. The appraisal district, not the school district or the County, gives notice and holds a hearing.

The Harris County Appraisal District does not levy taxes, so it could only loosely be referred to as "the taxing authority." Huffman Independent School District and Harris County do levy taxes, so they might possibly be referred to as "taxing authorities", although the Tax Code calls them "taxing units." Tex. Tax Code § 26.01. Taxing units would have no business giving Petitioner notice of increased appraisal, and, under the Tax Code, Harris County Appraisal District would not give notice of any increase in taxes assessed by taxing units. Tax assessments are not made until the appraisal rolls are complete; tax assessments are made by the entities having power to tax, such as school districts and counties.

Although the Code prohibits an appeal to the courts unless the landowner has participated in the administration process, the Texas courts have intertained appeals based on denial of due process, even though such appeals are not authorized by the Code. In *American National Trust & Savings Association v. Dallas Central Appraisal District,* 765 S.W.2d 451 (Tex.App.—Dallas 1988, writ denied), the Court remanded the case to the Dallas County Appraisal Review Board to conduct a hearing on the bank's protest of the appraisal that was made without notice to the bank.

The Texas Tax Code has now been amended to provide that persons, such as Petitioner, who claim an interest in the property can participate in the administrative process and give notice of protest of the appraised value of property. Sec. 41.44(d) Texas Tax Code.

It is not strictly true, as stated by Petitioner on page 8 of its application that no common-law or other remedy not provided in the Code may be asserted. To the extent that this claim was true in any part, it is no longer true because of the amendments to Section 41.44(d), Texas Tax Code. Even prior to the amendments to the Tax Code, Petitioner could have sued the Harris County Appraisal District (not Respondent taxing units) claiming denial of due process and asking for reappraisal. *American National Trust & Savings Association v. Dallas Central Appraisal District, supra.*

It seems apparent that Petitioner made its own business decision to put its money into the speculation in Texas real estate. The bottom now has fallen out of the real estate market. It is the usual practice of a lending institution to secure an abstract of title and a title opinion before loaning such a large sum (in the neighborhood of one million dollars). Now Petitioner says that it should not have any responsibility for monitoring the tax status of its property, and that the appraisal district must conduct a title search and notify all lienholders before any change is made in the appraisal of the property securing its loan. This position is at odds with the presumption that a property owner knows the law relative to taxing procedures affecting his property. *City of San Antonio v. Terrill,* 202 S.W. 361 (Tex.App.—San Antonio 1918, writ ref'd).

In this case Petitioner is seeking escape from taxation altogether. What it has asked the Texas Court to do is to declare that its supposed mortgage lien is superior to the tax lien on the basis of a due process violation. If the

property could be sold for enough to pay both the taxes and Petitioner's supposed lien it would not matter which had priority. Apparently, the property will not bring enough on today's market to pay both the debt and the taxes. Petitioner is not asking for a fair appraisal; it does not claim that the reappraiseal was wrong; it does not suggest what the appraisal value should have been, or what might have been the result if it had received written notice of the reappraised value and could have contested it. Petitioner does not ask for any relief related to the appraised value, whether too high or too low. What it asks is that the school and the county be penalized for some supposed defect in the procedures followed by the appraisal district—and the appraisal district is not even a party to the suit!

Petitioner's proper remedy, as exemplified by *American National Trust and Savings Association v. Dallas Central Apraisal District, supra,* was to have sued the appraisal district and asked the Texas courts to order the appraisal district to grant a hearing on the question of the proper appraised value.

If Petitioner doesn't have to pay taxes in this case, all the sophisticated creditors in the United States could possibly claim a refund of any taxes that were paid on property where the sophisticated creditor claims it had no notice of the appraisal procedure and did not know that the value of its investment had increased. This would be a real windfall for creditors and tax attorneys alike.

THE QUESTION PRESENTED

The "Question Presented" by Petitioner has elements that are meaningless. For instance, the phrase "to increase the tax appraisal" has no definite meaning. To increase "the tax burden" is vague and indefinite because the amount of the tax may be increased by an increase in the rate of tax or by an increase in the valuation of the property. The amount of the tax may even be lowered if the

tax rate is reduced enough, even though the valuation may be increased. Conversely the amount of the tax might be increased if the rate goes up enough, even though the valuation is reduced. The value of the property interest of Petitioner was probably diminished by the falling real estate market, not by the fact that a tax lien has priority over other liens.

Petitioner does not state that Respondents are guilty of unlawfully raising their tax rates, but only that the appraised value was increased (by the Harris County Apraisal District, not by Respondents). In fact, Petitioner does not even claim that Respondents raised their tax rates. Petitioner has no claim against Respondents, and asks for no relief against Respondents. In the absence of any claim for relief against Respondents, Petitioner's suit may be regarded as one seeking an advisory opinion only.

If Petitioner had joined the Harris County Appraisal District as a party and had shown itself entitled to any relief, the relief granted should only have been to nullify the taxes based on the amount of the increase in appraised value, not to nullify the priority of the tax lien in its entirety.

The court below properly ruled that the requirement of *Mennonite Bd. of Missions v. Adams,* 462 U.S. 791 (1983), for notice of a tax sale had been met. *Mennonite* does not require that the priority of all of a tax lien must be subordinated to a mortgage lien if some of the tax is imposed because of an increased appraisal of which the lien-holder had no notice.

CONCLUSION

For these reasons, and for the reasons stated in the opinion below, the application for writ of certiorari should be denied.

Respectfully submitted,

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